IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1078 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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RAMESHBHAI ICHCHHUBHAI RATHOD - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR HN JOSHI for Appellant(s) : 1,
MR HL JANI, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 03/09/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1.The present appellant-original accused No.1 along with original accused No.2 of Sessions

Case No.245 of 1996 were tried for the offence punishable under Secs.302-114 of Indian Penal Code and at the end of trial, the appellant-original accused No.1 was convicted for the offence under Sec.302 of IPC to undergo rigorous imprisonment for life and to pay fine of Rs.5,000/-, in default, to undergo rigorous imprisonment for a further period of six months while original accused No.2 was acquitted of all charges levelled against her, by the learned Sessions Judge, Surat vide judgment and order dated 29-8-1997 passed in Sessions Case No.245 of 1996.

2. The short facts of the prosecution case are that the complainant and his wife, deceased Ramilaben with their two children were staying in Segva Village, Olpad Taluka and were doing agricultural activities. On the date of incident i.e. on 8-1-1996, the complainant, the husband of the deceased had gone for labour work and deceased and their two children were at home. In the evening at about 6 p.m., when the deceased was preparing food in her house and both the children were playing very near to the house along with other children, the present appellant went inside the house of deceased, picked up the lamp, sprinkled kerosene from it on the deceased and ignited her. She therefore received severe burn injuries and started

screaming and hence, neighbours came there and tried to save her. It is further the case of the prosecution that when the complainant came back home at about 7 p.m., the deceased narrated the incident to him. Even mother of the deceased also came there at about 7 p.m. Thereafter, both the complainant and his mother-in-law went to Sayon Police Outpost and narrated the incident and his complaint was recorded against the present appellant and one Jamnaben, wife of Rameshbhai, initially for the offence under Secs.307 and 114 of IPC and it has been registered as Olpad Police Station I.C.R.No.3 of 1996. It was alleged by the complainant that the present appellant and original accused No.2 had a doubt about the illicit relation of the deceased with the brother of the appellant-accused No.1 and hence, they had a quarrel. Upon registration of the complaint, PSO handed over investigation to PSI, N.D.Vyas. On receiving the investigation of the above referred offence at about 12.30 p.m. on 9-1-1996, he went to the scene of offence i.e. Segva Village and made arrangements for preparing panchnama of scene of offence in the presence of panchas and seized the muddamal from the scene of offence. He also made arrangements to send the victim to hospital for treatment and also sent yadi to

Executive Magistrate for recording the dying declaration of the deceased. He also tried to search the accused and on 10-1-1996 he arrested both the accused by preparing arrest panchnama and they were sent to judicial custody. He also recorded statements of various witnesses and on 18-1-1996, as the victim succumbed to the injuries, he made arrangements for preparing inquest panchnama in the presence of panchas. He also filled in marnotar form and gave yadi to doctor for performing post mortem. He also sent yadi to concerned learned Magistrate for addition of Sec.302 of IPC. On receipt of post mortem report, etc. he kept the same in the investigation file. At the end of investigation, he submitted the charge sheet against the accused into Court of concerned learned Judicial Magistrate (First Class), Olpad, on 18-3-1996.

3. As the offence alleged against the accused being exclusively triable by the Court of Sessions, learned Judicial Magistrate (First Class), Olpad, committed the case to the Court of Sessions at Surat where it was numbered as Sessions Case No.245 of 1996.

4. On production of the accused, learned Sessions Judge, Surat, framed charge against the accused for the offence under Secs.302 read with Sec.114 of IPC. The accused pleaded

not guilty to the charge and prayed for trial.

5. To prove the charge against the accused, prosecution examined the following witnesses:

1) Chotubhai Budhiyabhai, P.W.1, Ex.13, the complainant and husband of the deceased.

2) Bhikhiben Gopalbhai, P.W.2, Ex.16, who is the sister of the deceased. She was turned hostile.

3) Bhaniben Thakorbhai, P.W.3, Ex.17, a neighbour. She also was turned hostile.

4) Uttambhai Dahyabhai Parmar, P.W.4, Ex.21, Executive Magistrate who recorded dying declaration of the deceased.

5) Dr.Mohmad Iqbal Hussainbhai Kureshi, P.W.5, Ex.25, who performed post mortem.

6) Balubhai Devabhai, P.W.6, Ex.34, PSO, Sayan Police Station.

7) Raju @ Jitu Chhotubhai Rathod, P.W.7, Ex.36, son of the deceased.

8) Nareshkumar Dashrathlal Vyas, P.W.8, Ex.37, PSI, Olpad Police Station, who carried out investigation and submitted charge sheet.

The prosecution also produced and proved various documentary evidence namely, inquest panchnama Ex.14, panchnama of scene of offence Ex.15, FSL report Ex.8, map of scene of offence Ex.9, post mortem note Ex.26,

cause of death certificate Ex.27, complaint Ex.35, charge Ex.4, yadi sent by the police for recording dying declaration of the deceased Ex.23 and dying declaration of the deceased Ex.24.

6. On submission of closing pursis by the prosecution, learned Sessions Judge recorded further statement of the accused under Sec.313 of Cr.P.C. and asked incriminating question to the accused. Upon affording opportunity of hearing to the learned advocates appearing for the respective parties, learned Sessions Judge, Surat, delivered the judgment whereby the appellant-original accused No.1 was convicted to undergo rigorous imprisonment for life and to pay fine of Rs.5,000/-, in default, to suffer further RI for six months which is giving rise to prefer the present appeal.

7. Heard learned counsel, Mr.H.N.Joshi for the appellant and Mr.H.L.Jani, learned A.P.P. for respondent-State.

8. Before proceeding with the matter, it is required to be noted that the case of the prosecution is based only on the evidence of a solitary witness and that too, a child witness aged about 8 years at the time of incident. Hence, the law on this point as laid down by the Apex Court is required to be kept in mind.

8.1 It has been held by the Apex Court in (2003)1 Supreme Court Cases 565 in the case of Joseph Vs. State of Kerala more particularly in paragraphs 12 and 13 as under:

"12. When there is a sole witness to the incident his evidence has to be accepted with an amount of caution and after testing it on the touchstone of the evidence tendered by other witnesses or evidence as recorded. Section 134 of the Indian Evidence Act provides that no particular number of witnesses shall in any case be required for the proof of any fact and, therefore, it is permissible for a Court to record and sustain a conviction on the evidence of a solitary eye-witness. But, at the same time, such a course can be adopted only if the evidence tendered by such witness is cogent, reliable and in tune with probabilities and inspires implicit confidence. By this standard when prosecution case rests mainly on the sole testimony of an eye-witness, it should be wholly reliable. Even though such witness is an injured witness and his presence may not be seriously doubted, when his evidence is in conflict with other evidence, the view taken by the trial Court that it would be unsafe to convict the accused on his sole testimony cannot be stated to be unreasonable. Particularly when the trial court had given cogent reasons to acquit the accused, the High Court ought not to have interfered with the same merely because another opinion is possible and not that the finding concluded by the trial court was impossible. The High Court did not follow the aforesaid standard but went on to analyse evidence as if the material before them was given for the first time and not in appeal."

8.2 The Supreme Court in the case of Lallu

Manjhi and another Vs. State of Jharkhand, (2003)2 Supreme Court Cases 401 has held in paragraph 10 as under:

“The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories, namely (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The Court as to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon testimony of a single witness.”(Para 10)

8.3 In the case of Alil Mollah and another Vs. State of W.B. Reported in (1996)5 Supreme Court Cases 369, it has been held by the Apex Court at head note 'B' as under:

“B. Criminal Trial—Witnesses--Solitary witness—Conviction can be based on the testimony of single eye witness if he is wholly reliable—Corroboration is required when he is only partly reliable—Conduct of the witness in not telling anyone about the occurrence till next day found unnatural creating an impression that he had not witnessed the incident—Witness not appearing before the IO who was camping in his village—Hence his plea that he was frightened and had no courage to inform anyone about the occurrence is not maintainable—In the circumstances of the case, no conviction can be founded on his uncorroborated testimony.”

8.4 The Apex Court has also held in another case of Bhimapa Chandappa Hosamani and others Vs. State of Karnataka reported in (2006)11 Supreme Court Cases 323 at head note 'A' as under:

"A. Criminal Trial—Witnesses--Solitary witness —Testimony of—Held, can be the basis of conviction but while doing so the court must be satisfied that his testimony is of such sterling quality that the court finds it safe to base a conviction solely on that— Credibility of the witness is to be tested by reference to the quality of his evidence which must be free of any blemish or suspicion, must impress the court as wholly truthful, must appear to be natural and so convincing that the court has no hesitation in recording a conviction solely on that basis—On facts held, evidence of PW 1(mother of the deceased and an alleged eyewitness) fell short of that quality because (i) she invented a false story about existence of motive; (ii) narration of events as they took place before actual murder also found untrue; (iii) considerable doubt as to whether the FIR was recorded on her saying at 8/8.30 a.m.; and (iv) her evidence creating suspicion as regards her being an eyewitness— Hence, in absence of any reliable corroboration of her testimony, appellants entitled to benefit of doubt."

9. The law relating to the child witnesses as laid down by the Apex Court in the reported decisions is also required to be borne in mind.

9.1 It has been held by the Apex Court in the case of State of U.P. Vs. Ashok Dixit and another reported in (2000)3 Supreme Court

Cases 70 in paragraph 9 as under:

“evidence of a child witness must be evaluated carefully as a child may be swayed by what others tell him and is an easy prey to tutoring. Wisdom requires that evidence of a child witness must find adequate corroboration before it is relied on.”

9.2 In AIR 2005 Supreme Court 913 in the case of Jagjit Singh v. State of Punjab, the Apex Court has held at head note (B) as under:

“ (B) Penal Code (45 of 1860), S.300 - MURDER - WITNESS - Murder - Evidence of eye-witness - Credibility - Accused alleged to have come on motor cycle in field where tubewell and a room was built and committed murder of three deceased - Eye-witness, a girl of 7 years - Facts showing that she was resident of another village and had no earlier opportunity of seeing or knowing the accused - She had named accused on persuasion of her father - There was unexplained delay of 3 days in recording her statement by Investigating Officer - No possible motive for accused to commit such heinous crime - Seizure of motor cycle and wrist-watch from place of occurrence not connecting accused - Conviction of accused on solitary statement of child witness - Improper - Accused held entitled to benefit of doubt.”

9.3 In another case reported in AIR 2003 SUPREME COURT 1088 in the case of Bhagwan Singh v. State of M.P., it has been held at head note 'A' as under:

“(A) Penal Code (45 of 1860), S.300 - MURDER - WITNESS - EVIDENCE - Murder - Evidence of child witness - Child, son of deceased, 6 years of age alleged to have seen the occurrence - Omission of prosecution in not holding test identification parade after child

witness named three assailants before police - Prosecution also failed to examine a person to whom the Child first met after incident - Further, conduct of his father was also unnatural as he made no enquiries from child before recording of his statement by police - Thus conviction of accused cannot be based on such sole testimony of child witness."

The Apex Court has further held in paragraph 19 of the aforesaid reported judgment as under:

> "The law recognises the child as a competent witness but a child particularly at such a tender age of six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not considered by the court to be a witness whose sole testimony can be relied without other corroborative evidence. The evidence of child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the court looks for adequate corroboration from other evidence to his testimony."

10. Keeping in mind the above referred law laid down by the Apex Court in various reported decisions, we have proceeded further and evaluated the evidence on record.

11. Relying upon the law laid down by the Apex Court in various reported judgments, learned counsel for the appellant, Mr.Joshi has vehemently argued that in this case, the case of the prosecution is based solely on the evidence of solitary witness. As per the law

of the land, Court can convict the accused even on the basis of solitary witness, however, for doing so, the principle laid down by the Apex Court has to be kept in mind. According to him, the Court has convicted the appellant based on the evidence of solitary witness who is a child witness and hence, while relying on the evidence of child witness, Court has to be more cautious. Relying upon afore referred three reported judgments namely, (2000)3 Supreme Court Cases 70, AIR 2005 SC 913 and AIR 2003 SC 1088, it is argued that in view of the principle laid down in these reported judgments, the evidence of child witness should be evaluated very carefully and on a minute scrutiny of the evidence of the child witness, if the Court is of the opinion that it is trustworthy and free from doubt, then only it can be relied upon for basing conviction. In the present case, the evidence of child witness does not appear to be trustworthy and free from doubt and hence, in view of the settled law by the Apex Court, conviction of the appellant based on the solitary evidence of child witness Raju @ Jitu Chotubhai Rathod, P.W.7, Ex.36 would not be tenable. It is therefore prayed that the appellant be acquitted.

12.Learned APP, Mr.H.L.Jani has supported the

impugned judgment delivered by the court below. He has taken us through the evidence of child witness, Raju @ Jitu Chotubhai Rathod, P.W.7, Ex.36, who is the son of the deceased aged about 8 years at the time of incident along with the evidence of complainant, Chotubhai Budhiyabhai, P.W.1, Ex.13, who is the husband of the deceased. According to him, evidence of child witness was found by the court below to be trustworthy and reliable and, therefore, conviction of the appellant based on the evidence of child witness is just, legal and proper and does not require any interference.

13. We have gone through the oral as well as documentary evidence shown to us by the learned counsel for the respective parties together with the reasoned judgment delivered by the court below. We have also minutely evaluated the evidence on record on the basis of law laid down by the Apex Court in the reported judgments hereinabove referred to.

14. Before proceeding further, it is required to be noted that in this case, except the evidence of child witness, P.W.7, there are no other evidence of witness claiming to be eye witness. In short, according to prosecution, the only eye witness is the child witness aged about 8 years.

15. As far as the complainant Chotubhai

Budhiyabhai, P.W.1, Ex.13, is concerned, he is the father of the child witness and husband of the deceased, who, even as per the say of the prosecution, was not at home or in the Village at the time of incident. He came later on at the place of incident in the evening.

16. As far as two other witnesses i.e. Bhikhiben Gopalbhai, P.W.2, Ex.16, who is the sister of the deceased and Bhaniben Thakorbhai, P.W.3, Ex.17, who is a neighbour are concerned, they have not supported the say of the prosecution and have been declared as hostile.

17. It is established from the evidence on record that mother of the deceased, who was residing nearby, had also reached the scene of offence and accompanied the complainant for lodging complaint with Sayon Police Outpost. However, she has not been examined by the prosecution as a witness.

18. As far as other witnesses examined by the prosecution are concerned, there is the evidence of P.W.5, Dr.Mohmad Iqbal Hussainbhai Kureshi, Ex.25, who performed post mortem on the dead body of the deceased and proved the post mortem note Ex.26. There is also evidence of Balubhai Devabhai, P.W.6, Ex.34, PSO of Sayan Police Outpost, who registered the FIR at Ex.35 as well as of P.W.8, Nareshkumar Dashrathlal Vyas, Ex.37,

PSI of Olpad Police Station, who carried out investigation and submitted charge sheet.

19. Apart from the evidence of afore referred witnesses, there are no other independent witnesses examined by the prosecution. Even though panchnama of scene of offence has been proved by exhibiting as Ex.15, no panchas have been examined. As far as other panchnama is concerned, it has also been exhibited as Ex.14 but panchas of said panchnama have also not been examined. We are however not entering into those aspects of the matter.

20. It is required to be noted that except prosecution witness No.1 i.e. the complainant, other two witnesses, who alleged to have reached at the scene of offence at the earliest, have not supported the say of the prosecution.

21. In order to the prove the dying declaration, prosecution has examined Executive Magistrate, Uttambhai Dahyabhai Parmar as P.W.4 at Ex.21. He proved dying declaration Ex.24.

22. It is required to be noted that while dealing with the evidence on record, learned Sessions Judge has dealt with the evidence of Executive Magistrate in paragraph 16 on page 79 of his judgment and ultimately came to a conclusion in paragraph 29 and has not

believed the dying declaration Ex.24 recorded by the Executive Magistrate. Since the said finding has not been challenged by the State, it remained unchallenged.

23. Now the only evidence upon which conviction has been based by the learned Sessions Judge is the oral evidence of Raju @ Jitu Chhotubhai Rathod, P.W.7, Ex.36, son of the deceased, who, according to the say of the court below, is the only eye witness. There is some admission on his part and some contradiction which has been proved by the otherside but court came to the conclusion that since he is a child witness aged about 8 years, his evidence is required to be evaluated in the way it had done and, therefore, we have to deal with the evidence of this child witness in its correct perspective.

24. It is established that at the time of incident, the child witness Raju @ Jitu Chhotubhai Rathod was aged about 8 years. He has deposed on oath into the court below that at the time of incident, he and his brothers were playing very near the house. When he went to his house, he saw that his mother was burnt. At that time, P.W.2, Bhikhiben Gopalbhai, Ex.16, was not present there. It is also established that the incident regarding quarrel between Rameshbhai and

victim had taken place at the residence of Rameshbhai and not at the scene of offence. It has also been deposed by the child witness that Rameshbhai has sprinkled acid upon the victim. However, the evidence on record suggests that kerosene was sprinkled upon the deceased and not acid. There is no other important evidence comingforth on record through this child witness. Even presence of the applicant accused at the time of incident has also not been established by the prosecution. Even child witness has also not deposed the same before the court below that he saw the accused in their house even prior to the incident or thereafter also. There are no other evidence indicating his presence at the place of incident.

25. As far as the quarrel is concerned, it has been established that quarrel had taken place but on which date and time have not been established by the prosecution. What is established is that there was some doubt regarding the illicit relation between the deceased and the brother of the accused No.1 and, therefore, since last 3-4 days some quarrels were going on. Except that, there are no evidence on record which connect the accused with the crime in question.

26. Thus, we believe that the child witness Raju @ Jitu Chhotubhai Rathod is not an eye

witness to the incident because at the time of incident, he was not at home but was playing with other children very near to his house. These are material aspects of the matter which cannot be ignored by any Court. In this case, court below has convicted the appellant relying only the evidence of child witness who is not an eye witness. Not only that, his testimony is not supported by any other corroborative piece of evidence.

27. Keeping in mind the principles laid down by the Apex Court in the decisions cited hereinabove, we are of the opinion the evidence of child witness Raju @ Jitu Chhotubhai Rathod do not inspire any confidence. We are therefore of the opinion that the prosecution is not able to connect the accused with the crime in question as there are no other evidence on record which involve the accused with the crime in question. Since the prosecution has failed to connect the accused with the crime in question from the evidence of child witness or other evidence on record, benefit of doubt is required to be given to the appellant. In view of the above, the impugned judgment and order is required to be quashed and the conviction of the appellant is required to be set aside. He is therefore required to be acquitted.

28.Thus, this appeal is allowed. Judgment and order of conviction and sentence dated 19-8-1997 delivered by the learned Sessions Judge, Surat, in Sessions Case No.245 of 1996 is quashed and set aside qua the appellant-original accused No.1-Ramesh Ichhubhai Rathod and he is ordered to be acquitted. He is therefore ordered to be set at liberty forthwith, if not required in any other offence.

(R.P.DHOLAKIA,J.)

(K.S.JHAVERI,J.)

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